

# REVIEWS

THE LAW PRACTICE OF ALEXANDER HAMILTON. Volume I. Edited by Julius Goebel, Jr. New York: Columbia University Press, 1964. 898 pp., \$18.50.

## I

From one viewpoint, this work may be described as a by-product of one of the great current projects in scholarly editing of the papers of the Founding Fathers. Since the first volume of *The Papers of Thomas Jefferson* was published fifteen years ago,<sup>1</sup> more than forty more such volumes have appeared,<sup>2</sup> and the end is by no means in sight. This lavish flow of documentary materials has not been universally nor unreservedly acclaimed; indeed, one reviewer, Professor Gunther, has filed an eloquent protest:

To a lawyer accustomed to the probably excessive array of indexes, digests, citators, and services available for legal research, the difficulty of locating scattered manuscript records is astounding. Until 1961, there was not even a list of major depositories of documents; a search for the papers of important judges, attorneys, or legislators began with an examination of single-volume guides published in some of the depositories — state and local historical societies, university libraries, and public archives. Most of the guides were incomplete and outdated and non-existent for many leading libraries . . . .

No doubt, then, the manuscript problem is serious. But there is considerable doubt that the present emphasis on multi-volume publication projects is the most effective response to the need to make our manuscript resources more readily available.

. . . [M]ost project plans, unfortunately, do not even assure that full information about the assembled documents will come at the time of publication. There may be good reason to stop short of publishing the full text of every item, but failure to list all fruits of the searches at the publication stage seems inexcusable . . . .

Since legal papers are among the most likely candidates for omission, legal scholarship will be a major victim of these failures. Thus, the Clay project's disregard of "Clay's work for clients" and "court files" will impede study of that important lawyer.<sup>3</sup>

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1. THE PAPERS OF THOMAS JEFFERSON (Boyd, ed. 1950- ) (seventeen volumes to date).

2. THE PAPERS OF BENJAMIN FRANKLIN (Labaree ed. 1959- ) (six volumes to date); THE ADAMS FAMILY PAPERS (Butterfield ed. 1961- ) (four volumes of the Diaries to date); THE PAPERS OF ALEXANDER HAMILTON (Syrett ed. 1961- ) (seven volumes to date); THE PAPERS OF JAMES MADISON (Hutchinson & Rachal eds. 1962- ) (three volumes to date); THE PAPERS OF HENRY CLAY (Hopkins ed. 1959- ) (three volumes to date); THE PAPERS OF JOHN CALHOUN (Merriweather & Hemphill eds. 1959- ) (two volumes to date). In addition to Princeton University's association with the Jefferson papers, the scholarly projects are advancing under the sponsorship of the following institutions: Franklin Papers, Yale University and the American Philosophical Society; Adams papers, the Massachusetts Historical Society; Hamilton papers, Columbia University; Madison papers, the University of Chicago and the University of Virginia; Clay papers, the University of Kentucky; Calhoun papers, the South Caroliniana Society.

3. Gunther, Book Review, 75 HARV. L. REV. 1669-71 (1962). Also see NATIONAL HISTORICAL PUBLICATIONS COMMISSION, REPORT AND PROPOSAL 15-19 (1963).

The papers of Alexander Hamilton and of John Adams are two specific projects which followed the practice of omitting legal papers, but Professor Goebel's superlative first volume of Hamilton's legal documents should answer a substantial part of Professor Gunther's general criticism. As a matter of fact, the economic wisdom of publishing purportedly complete collections of the papers of important public men is most effectively justified by the "second generation" of scholarly works, like Goebel's, which the primary projects are now generating. The whole is now becoming greater than the sum of its parts. For example, the associate editor of the Hamilton papers has prepared a definitive edition of *The Federalist* which provides a significant new perspective to the basic documentary collections on both Hamilton and James Madison during this period in their respective careers.<sup>4</sup> And, from the primary projects on both Adams and Jefferson there developed a perceptively edited collection of their correspondence which adds a valuable dimension to the parent volumes.<sup>5</sup>

The legal profession in particular, therefore, will welcome Goebel's work not only for the sharp definition it gives to Hamilton himself as a practicing attorney but for the vastly enlarged understanding it affords of nascent legal institutions in the United States of Hamilton's time. We have known distressingly little of both subjects in the past, and if the ultimate objective of documentary publishing is "an understanding and appreciation of the history of the United States"<sup>6</sup> through the papers of its leading men, the role of these men in shaping American law must be subjected to specialized editorial scrutiny. Regrettably, legal documents of such an important lawyer as Henry Clay were not given this type of treatment, and it is fervently to be hoped that the example from the Hamilton and Adams projects will be followed in the prospective undertakings involving Daniel Webster's papers at Dartmouth and — of all men — John Marshall's papers at the College of William and Mary.

To the financial support provided by certain foundations, university presses and private parties, the 88th Congress has recently added a modest proportion of public funds,<sup>7</sup> and more importantly has thereby re-emphasized the national interest in these scholarly projects.<sup>8</sup> Under the National Historical Publications Commission, a documentary history of the ratification of the Constitution and the Bill of Rights has been progressing for some time, with the first volume anticipated within a year. Under the Oliver Wendell Holmes Devise of the Library of Congress, a seven-volume history of the Supreme Court of the United States is approaching publication. Thus the reference shelf of basic documents, including a significant number in the field of law, is steadily length-

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4. *THE FEDERALIST* (Cooke ed. 1961).

5. *THE ADAMS-JEFFERSON LETTERS* (Cappon ed. 1959).

6. Federal Records Act of September 5, 1950, 64 Stat. 583, § 503(d), 44 U.S.C. 393(d) (1958).

7. Act of July 28, 1964, P.L. 88-383 Stat.

8. Act of June 19, 1934, 48 Stat. 1122, 44 U.S.C. §§ 300 *et seq.* (1958).

ening; but the assurance that it is not to be a mere proliferation rests upon the quality of the derivative or complementary works such as the present one.

## II

Goebel's work, indeed, would be a landmark even without reference to its parent collection, *The Papers of Alexander Hamilton*. The fact that a major body of both Hamilton's most significant legal papers and of many eighteenth-century records of the New York courts in which Hamilton practiced are extant makes it possible for Goebel's work to be an authoritative analysis of the substantive and procedural law of the early Republic, as well as of Hamilton the lawyer. The man and the times are in admirable juxtaposition, as the editor observes.<sup>9</sup>

Goebel's editorial approach might well be followed by others working in these fields. The very reason that has prompted, or threatens to tempt, some scholarly editors to omit legal materials from a man's collected papers — their cryptic technicality when "set down in their nakedness" — makes them richly revealing when given the necessary background by that rarest of specialists, the legal historian.<sup>10</sup>

The necessity of such background is demonstrated in the two opening chapters of this volume. Since Hamilton's professional documents were adapted to the specific procedure in law or chancery dictated by the subject matter, the reader must understand the organization of the judiciary in the period of revolution and early statehood. Therefore Goebel provides a concise and readily comprehensible description of the half-dozen or more courts which evolved from the colonial era to the first wars of statehood. This description is followed by the first major Hamilton document — one of the most remarkable in the

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9. The share of counsel in the development of our law, admittedly considerable, has been but imperfectly chronicled. Even those most eminent in their day remain in this respect figures in shadow, an impression that brief encounters with them in the law reports does little to dispel. . . . Hamilton's years at the bar spanned one of the most stirring periods in our history. It was also a period when the law was in rapid process of change and when the outcome of any juristic controversy depended as well upon a lawyer's mastery of pleading as upon his powers of advocacy. Few corners of the law's domain were unfamiliar to Hamilton, for his retainers required him to range widely. . . .

This documentary reconstruction of Hamilton's professional life has been designed with two ends in view: to establish what his professional capacities were, and to chronicle what his contributions to the growth of the law may have been. . . .

. . . His business, of course, involved the fortunes of his fellow men, strands inextricably woven into the fabric of their society. To view the documents, therefore, in an approximation of the atmosphere in which they were conceived should, we believe, make them speak more meaningfully than if set down in their nakedness. It has consequently seemed to us that rather than present the documents simply as exemplifications of professional craftsmanship, these, wherever possible, should be related to the life of the times, and to the immediate circumstances which evoked them.

Pp. ix, xii.

10. See Swindler, *Legal History, Unhappy Hybrid*, 55 L. LIB. J. 98 (1962).

volume — Hamilton's practice manual, or *Practical Proceedings in the Supreme Court of the State of New York*.

Apart from the fact that Hamilton's little treatise is the first work in the field of private law by one of the great lawyers of the early Republic, it holds a place of some distinction in the legal history of New York. It serves, indeed, as a link between an older way of remembrancing the peculiarities in this jurisdiction and what was to come . . . It is only necessary to compare *Practical Proceedings* with English law of the same period to discover the extent to which New York had departed from the paradigm.<sup>11</sup>

The comparison is made in a series of notes and exhibits prepared by the editor.<sup>12</sup> The manual itself covers, in succession, such subjects as process, bail, attorneys, venue, pleas, damages, witnesses, judgment and execution — followed, in somewhat briefer fashion, by recapitulations of substantive law on such matters as covenant, statutes of limitation, *audita querula* and trespass in ejectment.<sup>13</sup>

Thus the practice manual was substantially more than a typical "commonplace book" in which aspirants to the bar, reading under a practicing lawyer's direction, prepared themselves to be called.<sup>14</sup> It was, the editor concludes, a summary of accepted but generally unwritten procedural usages, indispensable complementary knowledge to the standard English authorities on law:

Since it was in the minds of New York judges and lawyers where reposed what Hamlet called the "quillies and oddities" of practice, English books were of little avail to one not privy to this unwritten law. Indications of the state of affairs are furnished by *Practical Proceedings* in Hamilton's consistently anonymous references to the unrecorded rules of colonial or state practice as "our law" or similar expression. On the other hand, his citation of English case law is often specific with reference to a reporter or a judge. In New York's jurisprudence, the rule of decision endured in practice and memory while its genesis was forgotten.<sup>15</sup>

While English treatises were hard to come by, and American publications on law virtually non-existent,<sup>16</sup> the documentary material which provides a

11. P. 41.

12. *E.g.*, a Bill of Middlesex, used by the Court of King's Bench in 1771 as set out in 3 Bl. Comm. xviii, and a Bill of Albany drawn in 1793, selected from among manuscripts in the New York County clerk's records — each a variant upon a writ of *capias*. Pp. 63-65, 136.

13. Pp. 55-135.

14. Although they are manifestly more elementary, a good deal may be learned of the state of the law and the state of the individual's understanding of the law as he entered practice from a new edition of the law notes in Thomas Jefferson's "commonplace book" — the law notes being precisely the material omitted in *THE COMMONPLACE BOOK OF THOMAS JEFFERSON* (Chinard ed. 1926). Also see BOYD, *op. cit. supra* note 2, at "Introduction." Even more revealing are the Law Notes and Accounts of John Marshall (MS. vol., College of William and Mary Library) which Beveridge mistook for George Wythe's lectures. 1 BEVERIDGE, JOHN MARSHALL 160 (1916).

15. P. 43.

16. The editor cites JAMES, A LIST OF LEGAL TREATISES PRINTED IN THE BRITISH COLONIES AND THE AMERICAN STATES BEFORE 1801, HARVARD LEGAL ESSAYS 159 (1934),

background to Hamilton's preparation and equipment for professional practice includes an appendix of Hamilton's citations and a list of the editions which presumably were available to him.<sup>17</sup> A comparison of these references with those enumerated by Thomas Jefferson, or in use at the College of William and Mary after 1779 and the Litchfield Law School after 1784, suggests the small degree of English literature in the law which was generally available to American practitioners in the last half of the eighteenth century.<sup>18</sup> Hamilton, in addition, brought to his preparation for the bar a broad background of general reading.<sup>19</sup>

A serious, promising young counsellor thus emerges, under the editor's reconstruction, from the introductory documents which make up the first quarter of the volume. In his twenty years of professional life, interrupted only by his period of service as Secretary of the Treasury, his practice covered the whole spectrum of law and chancery, the latter "with an emphasis on the commercial — fraud, bills of exchange, maritime insurance, and accounting."<sup>20</sup> Nationally, Hamilton's experience was rather more esoteric — he is reported to have participated in one of the Prize Cases before a judicial committee of the Continental Congress,<sup>21</sup> and he represented his state in one of the disputes over "western lands" in the United States Circuit Court for the District of Connecticut in 1796.<sup>22</sup>

### III

The remainder of Goebel's first volume is taken up with an equally detailed treatment of selected cases in public law; the next volume is to cover equity

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to the effect that from 1687 to 1788 no treatise intended for use of American lawyers was published in the colonies. This is not literally true; see STARKE, *OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE* (1774).

17. Pp. 848-67.

18. See 2 SOWERBY, *CATALOGUE OF THE LIBRARY OF THOMAS JEFFERSON* 192-433 (1953); MARSHALL'S *LAW NOTES AND ACCOUNTS* and *CATALOG OF LAW BOOKS USED BY STUDENTS AT THE COLLEGE OF WILLIAM AND MARY 1780-1861* (William and Mary Library); *LECTURES OF TAPPING REEVE 1787-1814* (Mss. vols., Litchfield Law School).

19. That Hamilton was able in a span of six months to achieve a sufficient mastery of the law to satisfy the examining judges may be laid to the fact that he came to his technical studies conversant with works then regarded as necessary groundwork to such studies. As already noted, he had been reading around in the law while yet a student at King's College. This was on his own initiative, for there was nothing then in the college curriculum to have opened the door to the literature of the law. But Hamilton's polemical pamphlets disclose that he had been exposed to works on the law of nations and nature then deemed a prerequisite to the study of English law itself — Burlamaqui, Grotius, Locke, Montesquieu, and Pufendorf. Beyond this he had read in Blackstone, Coke's *Reports*, Beawes's *Lex Mercatoria*, and obviously some work on principles of feudal tenures. He resorted to the texts of both English statutes and acts of Assembly in a way to disclose an aptitude for dealing with such technical matter.

P. 48.

20. P. 167.

21. P. 27.

22. Pp. 553-656.

and other subjects. The public law cases are divided into (1) issues growing out of the Revolutionary War, (2) interstate boundary disputes over "western lands," and (3) criminal cases. In each instance the editor has prepared a detailed background note on the state of the law in the subject area, and a companion note on the specific cases. The cases are familiar ones, upon which much new light is now thrown by the focus of Hamilton's own notes — including the struck materials and the marginalia — briefs, pleas entered, replications and other technical instruments which almost certainly would be among the omitted papers in a general collection.

Among the cases thus documented are *Rutgers v. Waddington*, in which Hamilton developed the theory of judicial review as one of his principal arguments,<sup>23</sup> the several disputes arising over the grants of western lands by New York, Massachusetts and Connecticut and pointing up in the process the cumbersome judicial procedure under the Articles of Confederation,<sup>24</sup> and the landmark case of *People v. Croswell*,<sup>25</sup> with its substantial constitutional propositions respecting the first amendment.

The respective viewpoints of Hamilton, Jefferson and Marshall on these and similar questions have been the subject of lengthy discussion; the present volume will provide a wealth of new documentary material on which to renew the subject.<sup>26</sup> Hamilton did not have the opportunity, as Webster did, to project his constitutional concepts in arguments before the Marshall court,<sup>27</sup> but it is worth noting that both Hamilton and Marshall, as attorneys, made their early reputation in cases growing out of the post-Revolutionary litigation over debts owed British merchants, or claims of Americans against licensees under British occupation. The comparison of the records of the two men remains to be made, but the material is at hand.<sup>28</sup> Marshall's position — demanded, of course, by the need to make a case for his clients, the Virginia

23. "*Rutgers v. Waddington* stands out, a marker on the long road that led to the ultimate formation of the American doctrine of Judicial Review." P. 282. See p. 283. Also see the dictum of Wythe, J., in *Commonwealth v. Caton*, 8 Va. (4 Call.) 5 (1782); and Hamilton in *THE FEDERALIST* 78 (Cooke ed. 1961).

24. Pp. 775-848.

25. 3 Johns. Cas. 337 (N.Y. 1803).

26. See, e.g., KONEFSKY, JOHN MARSHALL AND ALEXANDER HAMILTON (1964); ROSSITER, ALEXANDER HAMILTON AND THE CONSTITUTION (1964); *THE MIND OF ALEXANDER HAMILTON* (Padover ed. 1958); MITCHELL, ALEXANDER HAMILTON (1957-61); HACKER, ALEXANDER HAMILTON IN THE AMERICAN TRADITION (1957); SCHACHNER, ALEXANDER HAMILTON (1957); PRESCOTT, ALEXANDER HAMILTON AND THOMAS JEFFERSON (1934); BOWERS, JEFFERSON AND HAMILTON (1925); VANDENBERG, THE GREATEST AMERICAN (1922); LODGE, ALEXANDER HAMILTON (1908); ATHERTON, THE CONQUEROR (1902).

27. See, e.g., Webster's argument in *Dartmouth College v. Woodward*, 4 Wheat. 518, 552-615 (1819); Marshall's argument in the strikingly similar case of *Bracken v. Board Visitors of William and Mary College*, 7 Va. (3 Call.) 573, 579-80 (1790).

28. KONEFSKY, *op. cit. supra* note 26, does not include this in his study. Marshall's briefs, at least, are to be found in the records of the Virginia Supreme Court of Appeals and the United States Circuit Court for the District of Virginia in the Virginia State Library in Richmond.

debtors — was that the wartime sequestration and trespass acts of Virginia were not affected by the subsequent Treaty of Peace in 1784 or the Supremacy Clause<sup>29</sup> of the new Constitution after its ratification in 1788.<sup>30</sup>

Hamilton's position was elaborately developed in *Rutgers v. Waddington*, in which he appeared as defense counsel for loyalist licensees under the British occupation forces, in an action brought by the patriot owner of the property. The action was based on the wartime trespass act of the New York legislature,<sup>31</sup> and Hamilton's threefold argument as defense attorney was that the law of nations, as part of the common law adopted by New York, was a defense to such an action, that the Treaty of Peace signed by Great Britain and the United States commissioners was an equal defense, and that if the New York statute was in conflict with either, "a court must apply the law that related to a higher authority in derogation of that which related to a lesser when the two came in conflict."<sup>32</sup>

Duane, J., delivered a "studiously ambiguous"<sup>33</sup> opinion in the New York Mayor's Court and directed the jury to fix damages for the plaintiff. The small amount of the damages — £791 as against the £8,000 asked — and the vehement criticism of the opinion as tending to derogate the authority of the legislature suggests that Hamilton won a practical victory for his client and his argument.<sup>34</sup>

Because of Hamilton's rising reputation as a lawyer and because of his experience in the Continental Congress with the land claims of New York in Vermont, the State of New York, in spite of the fact that Hamilton was opposing her interests in the *Rutgers* case,<sup>35</sup> chose him in 1782 as her counsel against Massachusetts in their territorial disputes in Congress.<sup>36</sup>

The court of arbitration appointed by the Continental Congress never convened, the two states resorted instead to the appointment of a joint commission, and Hamilton's briefs were thus never submitted to a judicial body. But Goebel traces their subsequent use in Hamilton's arguments in the New York legislature in favor of Vermont's statehood, and suggests an intellectual if not a literal descent of Hamiltonian arguments to the 1926 case of New York and Massachusetts before the Supreme Court.<sup>37</sup>

Hamilton's experience with the arbitration machinery of the Continental Congress, and his discernment of constitutional questions inherent in any interstate disputes, can only be conjectured since the federal cases in which he was involved were quite few, were confined to inferior courts and developed

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29. U.S. CONST. art. VI.

30. *Ware v. Hylton*, 3 Dall. 199, 210-15 (1797).

31. P. 300.

32. P. 305.

33. P. 312.

34. P. 311.

35. P. 545.

36. Pp. 572, 582-83.

37. He later also represented New York in a similar dispute with Connecticut over land on the New York-Pennsylvania border known as the Connecticut Gore, *Ibid.*

too early in the constitutional history. In a subsequent case involving a land dispute between Connecticut and New York, originating in the United States Circuit Court for the District of Connecticut, counsel for New York, including Hamilton, moved to transfer the case to the Supreme Court; however, since both the trial court and the Supreme Court dismissed the actions, the interesting jurisdictional points in this situation were not disposed of.<sup>38</sup> It remained for Hamilton's major contribution to American constitutional theory, after the matter of judicial review raised in *Rutgers*, to be developed at the state level in the renowned freedom of the press case of *People v. Croswell*.<sup>39</sup>

This case, with its overtones of political payoffs and behind-the-scenes maneuvers, is doubly interesting for its dramatization of the Hamilton-Jefferson antipathies as well as its important doctrine on common law libel. Hamilton's role in attacking the English common law of libel — although he did not participate actively in the defense until an adverse verdict had been returned in the Court of General Sessions<sup>40</sup> — was "destined to leave a mark upon the constitutional history of New York uneradicated to this day."<sup>41</sup> Although Hamilton's motion for a new trial was lost upon an even division of the Supreme Court, the prosecution failed to move for judgment on the original verdict; what ultimately remained of the issue, in the developing jurisprudence on the subject, was Hamilton's elaborate speech insisting that truth was to be a proper defense to criminal libel as well as civil.<sup>42</sup>

#### IV

This detailed analysis of his law practice, one may safely say, imparts a totally new set of dimensions to the image of Alexander Hamilton. Hamilton has been exhaustively studied in terms of economic and political and personal history;<sup>43</sup> but not until now has he been revealed in terms of the activity to which most of his life after the Revolution was devoted — the law. The thoroughness with which Hamilton immersed himself in the law, as shown in the wide variety of papers which the editor has been able to find for the specific cases he has chosen to document, explains many things about the economic and political side of his career which have been missed by earlier studies.<sup>44</sup>

With this volume, too, the legal profession acquires a brilliantly illuminating report on the law itself for this period. Adams, Hamilton and Marshall were all busy and able practitioners in this period, and the impact of the law on their careers, and of their careers on the law, is a biographical and historical element which too long has been missing. When one reminds himself that as architects of the young Republic these men brought to their statecraft the institutional

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38. *Massachusetts v. New York*, 271 U.S. 65 (1926). See pp. 666-71.

39. 3 Johns. Cas. 337 (N.Y. 1803).

40. P. 793.

41. P. 846.

42. Pp. 808-42.

43. See note 26 *supra*.

44. See 1 MITCHELL, *op. cit. supra* note 26.



influences of their profession, the importance of supplying this long-missing element is manifest. The law of the new United States derived from two sources — the more important being the principles developed in colonial practice, and the second being the English law. Men who found themselves faced with the responsibility for striking off in new and unknown courses in the process of state-making, would also be ready to advocate fresh turns of theory for the law.

One looks forward with anticipation to the second volume of this masterful study; and if the editor is to be pardoned, as well he might be, for grouping the most dramatic documentary material in the first publication, there is consolation in the fact that Professor Goebel is also to be the author of the first volume in the Supreme Court history earlier described. With as perceptive a study of nascent Federal law as he has provided here for New York law, the cause of legal history and the legal profession will have been admirably served.

As a postscript — the present volume is superlatively printed.

WILLIAM F. SWINDLER\*

STEEL DECISIONS AND THE NATIONAL ECONOMY. Yale Studies in Economics, 16. By Henry W. Broude.\* New Haven: Yale University Press, 1963. Pp. x, 332. \$7.50.

WHAT originally was a promising, although somewhat pedantic, Ph.D. dissertation, circa 1954, has been transformed into an essay that utilizes casual empiricism and much irrelevant evidence to draw inferences that often seem unjustified and to derive policy prescriptions that are not clearly warranted.<sup>1</sup> In part, this is due to Broude's attempt to weld a new superstructure on an old keel. But, to a greater degree, it is caused by an incomplete implicit model of firm and industry behavior and an over-reliance on attitudinal statements. Yet, aside from its failure as an endeavor in economic analysis, and notwithstanding spasms of prolixity and redundancy, the book, in some respects, might be regarded as a success. It examines a matter that periodically has been of public concern, contains some interesting information and bits of analysis, and reads well.<sup>2</sup>

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1. Interestingly, Broude never cites his thesis, although much of the material in the volume has been taken directly from that earlier work, *cf.* *Capital Goods Industry in the Structure of a National Economy: An Example in Iron and Steel*, unpublished Ph.D. thesis, Harvard University, 1954.

2. The author's choice of the topic and his concentration on the steel industry appear to have been stimulated by the controversy engendered by President Truman's 1949 recommendation that the government intervene to eliminate shortages and assure adequate steel-making capacity. *State of the Union Message to the Congress of the United States*, January 5, 1949.

As several economists have observed, however, if recent tendencies continue, steel may well be the textiles of the next few decades, *i.e.*, an industry plagued by excess capacity, high unemployment, and low profitability.